

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

Docket No. 186,888

ORDER

Claimant and respondent both appealed from an Award Nunc Pro Tunc rendered by Administrative Law Judge Shannon S. Krysl on February 23, 1995.

APPEARANCES

Claimant appeared by and through his attorney, Gary A. Winfrey, Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, James A. Cline, Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through their attorney, Scott J. Mann, Hutchinson, Kansas.

ISSUES

Claimant argues the Administrative Law Judge did not have authority to enter the Nunc Pro Tunc Order because:

- (1) The Appeals Board had entered an Order approving the Award before the Administrative Law Judge entered the Nunc Pro Tunc Order; and,
- (2) The Nunc Pro Tunc Order was not, according to claimant, to correct clerical error, but instead modifies the original Award.

Respondent, on the other hand, argues that the Administrative Law Judge erred in awarding attorney's fees to claimant's attorney for work done in connection with the application for a nunc pro tunc order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds as follows:

(1) The Appeals Board finds that the present Nunc Pro Tunc Order did not exceed the authority of the Administrative Law Judge and did, in fact, act as a correction of a clerical error, not a modification of the Award. The Appeals Board finds that the Nunc Pro Tunc Order should, therefore, be affirmed.

Respondent first argues that when the Appeals Board enters its order approving the award, the award becomes an award by the Appeals Board and the Administrative Law Judge cannot modify an award of the Appeals Board. In this case, no appeal was taken from the original Award. The Appeals Board, therefore, approved the Award as it is required to do by K.S.A. 44-551. As indicated by the Kansas Court of Appeals in Hall v. Roadway Express, Inc., 19 Kan. App. 2d 935, 878 P.2d 846 (1994), the approved order entered by the Appeals Board is a rubber stamp approval. It does not constitute a review of the decision and is not an appealable order. It is a ministerial function which serves only as a formal indication that no appeal has been taken and the award is final. The Appeals Board, therefore, finds that the entry of such an order does not deprive the Administrative Law Judge of jurisdiction to enter an order nunc pro tunc.

Claimant next argues that the Nunc Pro Tunc Order entered in this case was more than a correction of clerical error and, in fact, altered the judgement actually rendered. Claimant, in effect, argues that the Order was not a true nunc pro tunc order.

The Order in question made corrections to the calculation of the benefits owed in the "Award" portion of the Order. In the original Award, the Administrative Law Judge found an average weekly wage of \$260.00. The Administrative Law Judge also found a five percent (5%) impairment. In the Award, however, the Administrative Law Judge used the maximum temporary total disability rate of \$299.00 per week. Based upon the wage found, the calculation should have instead yielded a weekly rate of \$172.34. The Nunc Pro Tunc Order corrected the weekly rate and corrected the resulting total amount of the Award. Claimant argues this is not a correction of clerical error but a change in the Award. The Appeals Board disagrees. The correction made by the Nunc Pro Tunc Order does not constitute a new finding. With the findings made by the Administrative Law Judge, the calculation is not a discretionary decision, it is mandated by statute that the weekly wage be multiplied by sixty-six and two-thirds percent (66 2/3%) to yield the weekly benefit. The Appeals Board, therefore, finds that the correction was not a new finding as would be prohibited by Norcross v. Pickrell Drilling Co., 202 Kan. 524, 449 P.2d 569 (1969). It is, instead, a correction of a clerical error and should be affirmed.

(2) The Appeals Board finds that the award of attorney's fees in connection with the application for the Order Nunc Pro Tunc should be reversed.

Claimant has requested attorney's fees pursuant to K.S.A. 1992 Supp. 44-536(g). The cited statute provides for an award of attorney's fees in connection with an attorney's services rendered subsequent to the ultimate disposition of the initial and original claim. The Appeals Board construes the statutory provisions as relating primarily to applications for review and modification. Although it may include other post-award matters, the current

issue relates to the initial claim and Award. The Appeals Board, therefore, finds the award of attorney's fees to be inappropriate in this case and reverses that portion of the order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order Nunc Pro Tunc dated February 23, 1995 should be affirmed as it corrected a clerical error in calculating the Award, but the award of attorney's fees contained therein should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of July 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary A. Winfrey, Wichita, Kansas
James A. Cline, Wichita, Kansas
Scott J. Mann, Hutchinson, Kansas
Shannon S. Krysl, Administrative Law Judge
David A. Shufelt, Acting Director